NO. 48742-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

SHANE JACKMAN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR JEFFERSON COUNTY

The Honorable Keith Harper, Judge

BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying the appellant's CrR 3.6 motion to suppress the evidence.

2. The trial court erred in entering the final section entitled "Conclusion" in its written findings and conclusions, including the portion that states

> The only intrusion, if it constituted an intrusion, was committed by the deputies when one of them walked to the front of the vehicle to view the [Vehicle Identification Number (VIN)] through the vehicle's windshield. This did not constitute a substantial and unreasonable departure from a non-intrusive area.

CP 143.[1]

3. With respect to counts 1 and 2, the charging document omitted an essential element of the crime of possession of a stolen motor vehicle.

Issues Pertaining to Assignments of Error

1. The trial court concluded that a police officer's foray off the path of travel to a residence, along the length of a car, to the front of the car, and then the viewing of a VIN through the car's windshield, did not did not "constitute a substantial and unreasonable departure from a

[1] CP 136-43. The findings and conclusions are attached to this brief as an Appendix.

non-intrusive area," and therefore did not constitute an illegal warrantless search.

Where the trial court's conclusion contravenes a Washington case involving nearly identical facts, as well as a recent United States Supreme Court decision, did the trial court err in denying the appellant's motion to suppress the evidence?

2. Knowledge that a motor vehicle is stolen is an essential element of the crime of possession of a stolen motor vehicle. In charging the appellant with two counts of possession of a stolen motor vehicle, did the State fail to include an essential element of the crime?

B. STATEMENT OF THE CASE

1. Procedural facts

The State charged Shane Jackman with two counts of possession of a stolen motor vehicle (1996 black Honda Accord and 1991 turquoise Honda Accord) (counts 1 and 2); theft of a motor vehicle (1990 black Acura Integra) (count 3); and third degree possession of stolen property, a gross misdemeanor (count 4). CP 22-34. As to count 4, the stolen property in question was an iPhone. RP 138-39. The crimes were alleged to have occurred on or about December 2, 2015. CP 33-34.

Following a CrR 3.6 hearing, the court denied Jackman's motion to suppress evidence supporting each of the charges. CP 136-43; RP 105-25.

Following a bench trial on stipulated facts, Jackman was convicted as charged. RP 130-39; CP 97-98 (court's findings); CP 38-95 (stipulated evidence, including police reports).

The court sentenced Jackman to a drug offender sentence alternative (DOSA)[2] of 25 months of incarceration plus 25 months of community custody. RP 151; CP 109-10.

He timely appeals. CP 123.

2. CrR 3.6 suppression hearing

Jackman moved to suppress evidence police discovered on his property, as well as his confession. CP 8-18. He argued in part that Jefferson County sheriff's deputies violated his constitutional rights by deviating from the driveway used to access his family's residence and garage. Police acted illegally, he argued, by approaching a car parked out of, and facing away from, the driveway, and then peering into the car's windshield to examine its VIN.[3] Jackman argued the offices' behavior was inconsistent with that of a reasonably respectful citizen, resulting in an illegal warrantless search. CP 11, 13. As a result, the fruits of the

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[2] RCW 9.94A.660.

[3] A call to dispatch revealed the car had been reported stolen. Then, the deputies, who were visiting the residence to ask about a stolen iPhone, went to the door of the garage and confronted Jackman about the car. CP 10. Jackman then made a number of admissions, which led to discovery of additional evidence supporting the charged crimes. CP 10-11.

initial illegal search (including Jackman's confession and additional evidence) had to be suppressed. CP 14.

a. Officers' testimony

The two sheriff's office employees who had conducted the search on Jackman's curtilage testified at the suppression hearing.

On December 2, 2015, at around 6 p.m., Deputy Adam Newman and Sergeant Andrew Pernsteiner met to discuss a stolen iPhone. RP 5. The iPhone's owner had reported his black Acura Integra was stolen from Bremerton. The owner's phone was in the car at the time. RP 5-7, 22, 30. The owner's "Find My iPhone" application had identified 512 Seal Rock Road in Jefferson County, located on the west side of Dabob Bay, as the phone's last location. RP 5-6, 30.

Newman and Pernsteiner drove to the address and realized it was an unoccupied waterfront vacation home. RP 6-7. There was, however, another residence nearby, located west of the vacation home across United States Route 101. RP 7, 15. After searching the vicinity for the black Acura, the officers parked on 101 and approached the residence, located at 304694 U.S. 101, on foot. RP 8, 31. The officers planned to ask the occupants about the missing phone. RP 28. It was after dark. RP 18.

The residence's driveway is a loop that travels around the residence as well as a garage, with an outlet leading to a neighbor's

residence. RP 8. Just west of 101, the driveway immediately forks, with one branch heading straight, or west, up a hill directly toward the main residence, and the other branch turning left, or south, and then curving to the right, or west. That branch forks again, heading straight (west) to a neighbor's house, or to the right (north) past a garage structure, and then past the main residence, where it loops back east toward 101. RP 8; Pretrial Exs. 1, 2, and 3.

Newman and Pernsteiner took the left, or southbound, fork around the south end of the garage. RP 8, 17. Newman testified that, based on prior visits to the residence, this was the normal direction of travel around the driveway. RP 25-26, 85.

The officers testified that they saw lights through an east-facing sliding glass door, located in what Newman described as the garage's "living quarters." RP 9; Pretrial Ex. 4. A set of stairs leads from the grass lawn to this door, which faces the highway. RP 20. Newman characterized this as the "front door" of the garage's living quarters. RP 19-20, 27, 90. Newman testified he was familiar with the residence, including the garage, from prior visits. RP 12.

According to Pernsteiner, who was not familiar with the residence, Newman said Jackman lived in a small apartment on the north end of the

garage. RP 32. Pernsteiner believed a west-facing door on the opposite side from the sliding door was the front door to this dwelling. RP 32.

Rather than proceeding directly to the east-facing door with the light on, the officers continued along the driveway. RP 9. They passed a parking area with room for two cars, located in front of the large garage doors used by vehicles. RP 9; CP 17. The parking area is located near the driveway, but is off the path of travel. RP 9, 41-42.

The officers noticed two cars parked in front of the garage doors. RP 9. A silver Acura Integra, the same make and model as the car reported stolen, was facing away from the garage and toward the southern loop of the driveway. RP 17. But the Acura was a different color and was obviously not the stolen car. RP 9, 33. However, according to the officers, the car's stock wheels were in the process of being replaced with a set of aftermarket rims. RP 9-10, 33. The officers ran the Acura's license plate. Nothing was amiss. RP 34.

The car next to it, a greenish Honda, was parked with its nose to the garage. RP 42. It did not have a license plate. RP 10, 33, 42. Intrigued, Sergeant Pernsteiner left the driveway, walked the length of the car toward the garage doors, and peered through the windshield at the VIN. RP 34, 42. Although it was dark out, a motion-activated light illuminated the car's interior. RP 10-11, 18. The officers called in the

VIN to dispatch, which revealed the car had been reported stolen. RP 11, 34. Although a no-trespassing sign was posted on the garage, the officers did not see it. RP 34; CP 138 (Findings of Fact 17 and 18).

Armed with additional suspicions, the deputies decided to approach the living quarters of the garage. Pernsteiner went to the east-facing door, while Newman went to the door on the west side of the building for "officer safety." RP 12-13, 87.

Jackman answered the east-facing door. Pernsteiner told him the officers were there for the phone. Jackman replied, "[l]et me go get it." RP 35. He retrieved an iPhone, which, according to Pernsteiner, unlocked to the Acura owner's four-digit pass-code. RP 35. Jackman said he had found the phone. RP 35; see also RP 73 (Jackman's testimony that he found phone at a casino in Shelton); CP 41 (police report including Jackman's statement to police that he had found phone in Shelton).

Pernsteiner asked Jackman to step outside. Jackman obliged. Pernsteiner then asked Jackman about the "stolen car" parked in front of the garage. RP 36. Jackman hung his head and sighed. RP 36. According to police reports, Jackman ultimately admitted to stealing the black Acura from Bremerton, although it was no longer in his possession. CP 41. Jackman also consented to a search of the garage, after the officers

told him they were going to obtain a search warrant. CP 42. The officers found a second stolen Honda in the garage. CP 45.

Newman and Pernsteiner each testified they would have gone to the residence at 304694 U.S. 101 to ask about the missing phone regardless of their discovery of the stolen car. RP 28.

b. Jackman's testimony

Jackman also testified at the suppression hearing. He believed the officers should not have knocked at the sliding glass door. See, e.g., RP 68, 72 (Jackman's testimony that door had been sealed until shortly before police came, and that the garage was no longer being used as living quarters). Moreover, Jackman believed police should have followed the initial westbound fork of the driveway, which did not pass the garage, because it was the most direct route to the main residence. RP 67, 81. Jackman testified no one lived in the garage. Rather, he lived in the main residence with his mother. RP 83. He testified, however, that he had briefly resided there in the past. RP 82. Regarding his statements to police, Jackman testified that, after being confronted about the stolen car, he was cooperative with police in hopes that he would avoid getting others in trouble. RP 75-77.

c. Court's findings and conclusions

After testimony and argument, the court denied the motion to suppress the evidence and statements. The court's findings largely reflect the officers' testimony as set forth above. CP 136-40. Among other findings, the court found that the primary path of travel on the loop driveway was as Newman had described, i.e., clockwise. CP 137-38 (Findings 7 and 8). The court found that, while the deputies did not see a "no trespassing" sign on the garage near where Pernsteiner peered into the windshield, such a sign was posted. RP 138 (Findings 17 and 18). Finally, the court found that "the deputies indicated that they intended to go to the garage [and attached residential unit] regardless of whether or not any vehicle had been present in the driveway." RP 140 (Finding 140).

For its "conclusions of law," the court outlined its perception of the key points of five Washington state cases, many of which are discussed in the argument section below. CP 140-42.

The written findings and conclusions document also contains a section entitled simply, "Conclusion." That section provides conclusions of law specific to this case:

> The Deputies in the present case were headed to the residential . . . portion of the garage since that was the only part of 304694 that appeared to be inhabited at the time. The deputies intended to speak with [Jackman] about the missing phone regardless of any vehicles that were parked

> nearby. At the time the deputies went to speak with [Jackman], he was not suspected of being involved with the stolen car or phone.
>
> The security light activated as the deputies approached two vehicles that were parked outside of [Jackman's] garage. One of the vehicles was of the same make and model as the one reported stolen, though a different color. Next to it was stacked tires with aftermarket black rims, similar to those that were on the stolen car. The deputies were suspicious of this vehicle because of the tires and because it did not have a license plate.
>
> *The only intrusion, if it constituted an intrusion, was committed by the deputies when one of them walked to the front of the vehicle to view the VIN through the vehicle's windshield. This did not constitute a substantial and unreasonable departure from a non-intrusive area. The officer did not enter the vehicle, look for anything else or nay contraband, nor did the officer engage in any questionable activity after having observed the VIN.*

CP 142-43 (emphasis added).

C. ARGUMENT

1. THE COURT ERRED IN DENYING THE APPELLANT'S MOTION TO SUPPRESS THE EVIDENCE FOLLOWING THE ILLEGAL SEARCH OF THE HOME'S CURTILAGE.

Sergeant Pernsteiner conducted an intrusive warrantless search when, without a warrant, he deliberately diverged from the undisputed clear path of travel to the residence, walked up to the front of one of the cars parked in front of the garage, and peered in at the VIN. This case is

nearly identical to State v. Daugherty,[4] which, for purposes of the issues present in this case, remains good law. Moreover, the trial court's decision is inconsistent with, as a matter of law, the United States Supreme Court's relatively recent decision in Florida v. Jardines.[5]

As a result, the evidence, including Jackman's incriminating statements, must be suppressed as the fruits of the illegal search. Because this evidence supplied the only support for the charged crimes, each of Jackman's convictions must be reversed.

a. Introduction to applicable law.

In reviewing a lower court's decision on a suppression motion, this Court determines whether substantial evidence supports the challenged findings of fact, and whether the findings support the conclusions of law. State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Evidence is substantial if it is enough "'to persuade a fair-minded person of the truth of the stated premise.'" Id. (quoting State v. Reid, 98 Wn. App. 152, 156, 988 P.2d 1038 (1999)). This Court reviews de novo conclusions of law relating to the suppression of evidence. Garvin, 166 Wn.2d at 249.

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[4] 94 Wn.2d 263, 616 P.2d 649 (1980), overruled on other grounds by State v. Hill, 123 Wn.2d 641, 870 P.2d 313 (1994).

[5] Florida v. Jardines, __ U.S. __, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013).

Unless the State proves an exception is present, a warrantless search is impermissible under the state and federal constitutions. U.S. CONST. amend. IV; CONST. art. I, § 7;[6] State v. Gaines, 154 Wn.2d 711, 716, 116 P.3d 993 (2005). In other words, the Fourth Amendment and article 1, section 7 render warrantless searches per se unreasonable unless they fall within "a few specifically established and well-delineated exceptions." State v. Chrisman, 100 Wn.2d 814, 817, 676 P.2d 419 (1984). Generally speaking, evidence resulting from an illegal search must be suppressed under the exclusionary rule, or the "fruit of the poisonous tree" doctrine. Gaines, 154 Wn.2d at 716-17.

Article 1, section 7 is more protective of an individual's right to privacy than its federal constitutional counterpart; this protection is even greater when the intrusion involves the home of an accused. "In no area is a citizen more entitled to his privacy than in his or her home. For this

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[6] The Fourth Amendment provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath ... particularly describing the place to be searched and the persons or things to be seized.

Article 1, section 7 of the state constitution, which offers even greater protection of individual rights, provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." State v. Gunwall, 106 Wn.2d 54, 65, 720 P.2d 808 (1986).

reason, the closer officers come to intrusion into a dwelling, the greater the [article 1, section 7] protection." State v. Ferrier, 136 Wn.2d 103, 111-12, 960 P.2d 927 (1998) (quoting State v. Young, 123 Wh.2d 173, 185, 867 P.2d 593 (1994) (internal quotations omitted)).

Entry onto a home's curtilage by police officers may result in violation of a resident's constitutional rights. It is *possible* for an officer on legitimate business to enter a portion of the curtilage impliedly open to the public, such as a driveway, walkway, or access route leading to the residence, without violating the resident's rights. State v. Seagull, 95 Wn.2d 898, 902, 632 P.2d 44 (1981); State v. Petty, 48 Wn. App. 615, 618, 740 P.2d 879 (1987). "An officer is permitted the same license to intrude as a reasonably respectful citizen." Seagull, 95 Wn.2d at 902. This is so even if the purpose of the intrusion is investigative. Petty, 48 Wn. App. at 619. Moreover, if a police officer is within an impliedly open area, or a non-intrusive vantage point, and she detects something by use of the senses it may be considered an "open view." State v. Myers, 117 Wn.2d 332, 345, 815 P.2d 761 (1991); Seagull, 95 Wn.2d at 906.[7]

[7] The "plain view" doctrine applies after an officer intrudes into an area where a reasonable expectation of privacy exists. The officer may seize evidence without a warrant if he has made a justifiable intrusion and inadvertently sights contraband in plain view. In contrast, the "open view" doctrine applies when an officer observes an item of evidence from

But, under Seagull's oft-repeated proscription, either (1) "a substantial and unreasonable departure" from an area that is impliedly open to the public, or (2) a particularly intrusive method of viewing, *exceeds* the scope of the implied invitation. Such an intrusion violates the resident's constitutional rights. Seagull, 95 Wn.2d at 903.

b. The police officers' search in this case did not satisfy any exception to the warrant requirement.

Under Jardines and Daugherty, the police officer's actions in this case constituted a warrantless search of the curtilage, and no exception applies.

"While law enforcement officers need not 'shield their eyes' when passing by the home 'on public thoroughfares' . . . an officer's leave to gather information is sharply circumscribed when he steps off those thoroughfares and enters the Fourth Amendment's protected areas. Jardines, 133 S. Ct. 1415 (quoting California v. Ciraolo, 476 U.S. 207, 213, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986)). The area around the home, the curtilage, is "intimately linked to the home, both physically and psychologically," and is where "privacy expectations are most heightened." Ciraolo, 476 U.S. at 213.

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a non-constitutionally protected area. State v. Gibson, 152 Wn. App. 945, 955, 219 P.3d 964 (2009)

In Jardines, officers entered Mr. Jardines's yard with a drug-sniffing dog and, after the dog "alerted" at Jardines's front door, they applied for and obtained a search warrant for his home. Whether the search warrant was valid turned on whether the officers' entry into the yard was "an unlicensed physical intrusion" or, rather, Jardines "had given his leave (even implicitly)" for the officers to do that. 133 S. Ct. at 1415.

Writing for the Court, Justice Scalia first observed that, under cases such as Katz v. United States,[8] the Fourth Amendment did not require a property trespass in order for a violation to occur. But such cases only added to the "baseline" protections under the Fourth Amendment. Katz "does not subtract anything from the Amendment's protections 'when the Government does engage in [a] physical intrusion of a constitutionally protected area.'" Jardines, 133 S. Ct at 1414 (quoting United States v. Knotts, 460 U.S. 276, 286, 103 S. Ct. 1081, 75 L. Ed. 2d 55 (1983) (Brennan, J., concurring in the judgment).

Because the officers' investigation took place in a constitutionally protected area—Jardines's home's curtilage—the Court moved on to the question of whether it was accomplished through an unlicensed physical

[8] Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed.2d 576 (1967) (government's surveillance of a public telephone booth conversation, by attaching electronic listening and recording device to the outside of the booth, violated Fourth Amendment).

intrusion. Jardines, 133 S. Ct. at 1415. The Court then summarized the applicable common law:

> "A license [to ender property] may be implied from the habits of the country," notwithstanding the "strict rule of the English common law as to entry upon a close." McKee v. Gratz, 260 U.S. 127, 136, 43 S. Ct. 16, 67 L. Ed. 167 (1922) (Holmes, J.). We have accordingly recognized that "the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds." Breard v. Alexandria, 341 U.S. 622, 626, 71 S. Ct. 920, 95 L. Ed. 1233 (1951). *This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave.* Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters. *Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is "no more than any private citizen might do."* Kentucky v. King, 563 U.S. [452, 469], 131 S. Ct. 1849, []179 L. Ed. 2d 865 (2011).
>
> But introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. *There is no customary invitation to do that* . . . . To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to—well, call the police. *The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose.*

Id. at 1415-16 (some emphasis added) (footnotes omitted).

A concurring opinion authored by Justice Kagan would have decided the case on privacy rather than property grounds. But she offered her own example of limitations on a resident's implied license to approach the front door:

> A stranger comes to the front door of your home carrying super-powered binoculars. . . . He doesn't knock or say hello. Instead, he stands on the porch and uses the binoculars to peer through your windows, into your home's furthest comers. . . . Has your "visitor" trespassed on your property, exceeding the license you have granted to members of the public to, say, drop off the mail or distribute campaign flyers? *Yes, he has.*

Id. at 1418 (Kagan, J., concurring) (emphasis added).

The dissent, which would not have found the officers' entry into Jardines's yard to be a trespass, agreed that the implied license to proceed up a walkway to a front door arising from custom has "spatial and temporal" limits. Id. at 1422. Among the dissent's examples of such limitations are that custom does not give rise to an implied license to veer from the established walkway, "come to the front door in the middle of the night without an express invitation," or linger: "The license is limited to the amount of time it would customarily take to approach the door, pause long enough to see if someone is home, and (if not expressly invited to stay longer), leave." Id. at 1422-23 (Alito, J., dissenting).

Here, even though the police officers did not have drug- (or stolen car-) sniffing dog in tow, their actions clearly exceeded the scope of the implied invitation. There is no customary invitation for after-dark visitors to wander off a driveway and peer into the windshields of cars facing away from the driveway. The looming no-trespassing sign is further indication that the officers exceeded the scope of their license in this case.

State v. Daugherty,[9] aptly relied on by Jackman below, is consistent with Jardines and, moreover, nearly factually identical to his case.

There, a Poulsbo company's employees arrived for work and discovered their office had been burgled. The company's safe was missing. The safe appeared to have been removed by hand truck through a smashed-in door to a storage area. Daugherty, a driver for the company, became a suspect. Daugherty, 94 Wn.2d at 265.

Officer Patterson and three subordinate officers, including an Officer Krebs, drove to Daugherty's home. When they arrived, the officers saw Daugherty's pickup and an Army truck backed up against the open door to the garage. Officer Krebs got out of the car and walked up the right side of the driveway. At the same time, Daugherty came out from

[9] 94 Wn.2d 263, 616 P.2d 649 (1980), overruled on other grounds by State v. Hill, 123 Wn.2d 641, 870 P.2d 313 (1994).

behind the trucks and met Officer Patterson in front of the trucks near the driveway entrance. Id. at 265-66.

While Daugherty and Patterson were speaking, Krebs went to the back end of the two trucks, near the opening of the garage, for officer safety purposes. Id. at 266. From that vantage point, Krebs noticed what appeared to be a safe partially protruding from a tarp in the garage. Police officers eventually removed the tarp and discovered the stolen safe. Id.

The State argued that seizure of the safe was permissible under the "plain view" exception to the warrant requirement. Id. at 267 (citing Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971)). The Supreme Court ruled, however, that the State had failed to meet its burden of showing the warrantless search fell within any exception to the warrant requirement. It therefore reversed Daugherty's convictions. Daugherty, 94 Wn.2d at 272.[10]

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[10] Although the Supreme Court affirmed the Court of Appeals' determination that the fruits of the illegal search must be suppressed, the Supreme Court relied on a different rationale, implicitly disavowing the Court of Appeals' analysis on that point. The Court of Appeals had, for example, *rejected* Daugherty's argument that Krebs's view of the safe from his officer safety position constituted an illegal search.

> Technically, the officers' entrance onto the driveway might have constituted an abstract, theoretical trespass, but Daugherty's privacy was not invaded . . . . The driveway was not a constitutionally protected area. . . . Accordingly, when Officer Krebs observed the safe from outside the

The Court first observed that a section of driveway that was exposed to view from the street, and that was a means of conventional access to the house, was *not* protected from (1) view by police officers or (2) from an incursion by officers with a legitimate purpose walking across it to reach the door of the home. Id. at 264, 268.

On the other hand, Daugherty's entire driveway could not be considered a pathway to his house. Id. at 268.

> When [Daugherty] parked his two vehicles at the rear of his driveway, in effect blocking and obscuring from view the remaining portion of the driveway and the interior of the garage, he had a subjective expectation that a small squad of police officers would not thread around and among the vehicles in an effort to meet him at his door. . . . Moreover, the expectation revealed by [Daugherty's] action is certainly an objectively legitimate one which "society, is prepared to recognize as 'reasonable.'" [Katz v. United States, 389 U.S. 347, 361, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)] (Harlan, J., concurring).

Daugherty, 94 Wn2d at 268-69.

The Court added that it "need not determine whether the driveway became a protected area at the front of respondent's vehicles, or at the point where the officers first strayed substantially from a normal pathway directly to respondent." Id. at 269. Regardless, when Officer Krebs

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> garage he had not yet intruded upon a constitutionally protected area. . . . . He saw the safe in "open view" and immediately recognized its significance.

State v. Daugherty, 22 Wn. App. 442, 444, 591 P.2d 801 (1979), aff'd, 94 Wn.2d 263, 616 P.2d 649 (1980).

completed a "flanking action" around Daugherty to the right of the truck, he had entered a protected area. Id. If the intrusion was unlawful, the resulting seizure of the safe was also unlawful. Because the officers had no lawful right to be in that area, the evidence discovered there had to be suppressed. Id.; see also State v. Hoke, 72 Wn. App. 869, 875, 877, 866 P.2d 670 (1994) (detective exceeded the scope of implied invitation by departing from the front porch and walking around to side yard; access to yard was partially obstructed by miscellaneous objects, yard was covered in grass and had no defined pathway, thick foliage bordered the yard, and the detective deviated from the direct access route to the house).

As stated above, this case is nearly identical to Daugherty. The officers deviated from any path to any door to any part of the garage or main residence where they might knock and find someone home. Only from that protected location was Sergeant Pernsteiner able to peer into the car to see the VIN by the glow of the motion-activated light. Because he had no right to be in that area to make that discovery, the action constituted an illegal warrantless search.

c. The *Seagull* standard, to the extent that it survives *Jardines*, also supports that a warrantless search occurred.

The State may argue that the officers' intrusion was permitted under Seagull, which is often treated as the seminal case in Washington.

But Seagull distinguished Daugherty and explicitly left its holding intact.[11] Thus, to the extent that the Seagull "substantial and unreasonable departure" / "particularly intrusive method of viewing" standard survives the Jardines decision, Daugherty establishes the intrusion in this case falls within that category of intrusion. Moreover, many of the factors the court relied on to uphold the officer's actions in Seagull are absent in this case.

In Seagull, a police officer's *slight* deviation from the most direct access route to a door was the only factor that might have appeared unreasonable. In determining whether the officer's actions constituted a warrantless search, the Court also considered other factors, including: (1) the fact that the officer did not act secretly; (2) he approached the house in daylight; (3) he saw suspected contraband from a normal access route to the house; (4) he did not create an artificial vantage point; and (5) he made the discovery accidentally. These remaining circumstances made the discovery of the suspected contraband reasonable. Seagull, 95 Wn.2d at 905.

The police officers' actions in this case would not have survived the Seagull Court's analysis. For example, the officer in Seagull did not create an "artificial vantage point" from which to see the suspected contraband. Id. Here, that is exactly what the police officers did.

[11] Seagull, 95 Wn.2d at 906.

Moreover, in this case, the discovery was not accidental. Sergeant Pernsteinier purposely deviated from the clear path to the house for investigative purposes. Thus, even under the Seagull standard, the officers' actions in this case must be considered an unlawful search.

In summary, regardless of whether the primary door to the garage's residential area faced east, or west, and regardless of whether it was reasonable for police officers to look for residents in the garage rather than the main house, Sergeant Pernsteiner's foray to front of the car was not a reasonable deviation from the path to the house. It was, under Daugherty, an invalid warrantless search. Under the Seagull standard, it constituted a "particularly intrusive method of viewing." 97 Wn.2d. at 903. Under the Jardines standard, the officers' actions violated the Fourth Amendment because they clearly exceeded the implied license granted to visitors to approach a home. Under each of these cases, the viewing of the VIN constituted an unconstitutional warrantless search.

d. The remedy is suppression, and no independent source, or theory of inevitable discovery or attenuation, can salvage the effects of the illegal search in this case.

No independent source or inevitable discovery theory is capable of curing the effects of the illegal search in this case. The remedy for the constitutional violation is suppression of all the evidence, including

Jackman's incriminating statements, and the evidence discovered in the subsequent search. This evidence was, clearly, fruit of the poisonous tree.

"The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means." State v. Eisfeldt, 163 Wn.2d 628, 640, 185 P.3d 580 (2008) (quoting State v. Duncan, 146 Wn.2d 166, 176, 43 P.3d 513 (2002)). Where evidence is obtained as a direct result of an unconstitutional search, that evidence must also be excluded as "fruit of the poisonous tree." Wong Sun v. United States, 371 U.S. 471, 487-88, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963) (internal quotation omitted). "'The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion." Eisfeldt, 163 Wn.2d at 639-40 (quoting Wong Sun, 371 U.S. at 485). Verbal evidence that derives immediately from illegal police action is "no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion." Wong Sun, 371 U.S. at 485.

The independent source doctrine is, nonetheless, a viable exception to article I, section 7. Gaines, 154 Wn.2d 711. But it requires that the State acquire the evidence "pursuant to a valid warrant or other lawful means independent of the unlawful action." Id. at 718. The independent source doctrine demands an *actual*, not hypothetical or imaginary, independent source.

This Court should reject any argument that Jackman's statements to police, made immediately after being confronted with the presence of a stolen vehicle in his driveway, provided an independent source for the evidence. Here, the officers' unconstitutional warrantless search led to discovery of VIN. This led directly to Jackman's confession and the discovery of additional evidence.

There was no actual independent source independent from the officers' illegal activity. For example, Jackman produced the phone even before learning the police had seen the stolen car. But he told police he had found the phone in a casino parking lot. This is not a far-fetched explanation, and there is no indication that police would have gotten more out of Jackman had the illegal search not occurred.

Nor may the inevitable discovery doctrine be relied upon to validate the search that followed Jackman's confession. The federal inevitable discovery doctrine "allows admission of illegally obtained evidence." State v. Winterstein, 167 Wn.2d 620, 634, 220 P.3d 1226 (2009) (citing Nix v. Williams, 467 U.S. 431, 444, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984)). But this doctrine has been held to be "at odds with the plain language of article I, section 7." Winterstein, 167 Wn.2d at 635.

Finally, under the Fourth Amendment, evidence obtained following illegal acts may, nonetheless, be admissible if the connection

between the evidence and the illegal acts is sufficiently attenuated or remote. This is has been discussed as a *possible* exception to the fruit-of-the-poisonous-tree doctrine in Washington. See State v. Eserjose, 171 Wn.2d 907, 920-21, 259 P.3d 172 (2011) (three-justice lead opinion, joined by one justice concurring in result only, and another justice joining the result but explicitly disavowing "attenuation" doctrine analysis).[12]

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[12] Eserjose establishes that the state Supreme Court has been hopelessly fractured when it comes to the attenuation doctrine.

Upon receiving a tip that Eserjose and a housemate might have been responsible for a burglary, police officers were dispatched to Eserjose's father's home, where all three men lived. Eserjose, 171 Wn.2d at 909-10. The father let police into the house but did not give them permission to go up the stairs to the bedroom area. Police disregarded the limited permission, went up the stairs, and arrested both suspects in violation of Payton v. New York, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). Eserjose, 171 Wn.2d at 910. Eserjose was taken to the police station and, after being advised of his rights and being told his accomplice had implicated him, confessed to the crime. Id. at 911.

Relying on a factually similar federal constitutional case, the lead opinion found the attenuation doctrine rehabilitated Eserjose's otherwise-tainted confession. Id. at 917-18 (citing New York v. Harris, 495 U.S. 14, 110 S. Ct. 1640, 109 L. Ed. 2d 13 (1990)). The lead opinion concluded that "the proper inquiry is whether the confession is 'sufficiently an act of free will to purge the primary taint'" and found under the facts it was. Id. at 918-19 (quoting Brown v. Illinois, 422 U.S. 590, 602, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975)). One justice signed this opinion in "result only."

Writing separately, the chief justice concluded the confession was "connected to [Eserjose's] learning of his accomplice's confession, and not to any illegality associated with the deputies' exceeding the scope of consent to enter the home. This should end the analysis." Eserjose, 171 Wn.2d at 931 (Madsen, C.J., concurring).

Assuming for the sake of argument that the doctrine applies in Washington, it is well established that the State has the burden to demonstrate the evidence is sufficiently attenuated from the illegal search to dissipate the taint of the illegal action. State v. Ibarra-Cisneros, 172 Wn.2d 880, 885, 263 P.3d 591 (2011) (citing State v. Childress, 35 Wn. App. 314, 316, 666 P.2d 941 (1983); Nardone v. United States, 308 U.S. 338, 341, 60 S. Ct. 266, 84 L. Ed. 307 (1939)).

Thus, even if the doctrine were to be adopted in Washington in some future case, it would clearly not apply here. Jackman's confession flowed directly from the illegal search. Although the trial court found the officers were planning to question the residents of the home about the phone regardless of the VIN discovery,[13] this finding is largely irrelevant. Jackman had a plausible explanation for possessing the phone. Only after the officers confronted Jackman about the stolen vehicle did he offer incriminating information.

In summary, all evidence supporting the charges in this case flowed directly from the illegal search that revealed the stolen vehicle

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But a four-justice dissent rejected the doctrine entirely. Id. at 940 (C. Johnson, J., dissenting).

[13] CP 140 (Finding of Fact 28).

VIN. All the evidence discovered by police that day must be suppressed as the fruit of the poisonous tree.

e. Dismissal of all charges is required.

Without the illegally obtained evidence, the State cannot prove the charged crimes. This Court should therefore reverse Jackman's convictions and remand for dismissal with prejudice. State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999); State v. Armenta, 134 Wn.2d 1, 17-18, 948 P.2d 1280 (1997) (dismissal of charge is appropriate where unlawfully obtained evidence forms the sole basis for the charge).

2. THE CHARGING DOCUMENT OMITTED AN ESSENTIAL ELEMENT POSSESSION OF A STOLEN MOTOR VEHICLE.

An essential element of possession of a stolen motor vehicle is knowledge that the motor vehicle was stolen. Because the charging document omitted this essential element, Jackman's convictions for possession of a stolen motor vehicle must be reversed.

A charging document must include all essential elements of a crime. U.S. CONST. amend. VI; CONST. art. I, § 22 (amend. 10);[14] State v. Kjorsvik, 117 Wn.2d 93, 108, 812 P.2d 86 (1991). An "essential element

[14] U.S. CONST. amend. VI provides that "[i]n all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation . . . ." CONST. art. I, § 22 provides in part that "[i]n criminal prosecutions, the accused shall have the right to . . . demand the nature and cause of the accusation."

is one whose specification is necessary to establish the very illegality of the behavior[.]" State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992) (citing United States v. Cina, 699 F.2d 853, 859 (7th Cir.), cert. denied, 64 U.S. 991 (1983)). Essential elements may derive from statutes, common law, or the constitution. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

Where, as here, the adequacy of an information is challenged for the first time on appeal, this Court engages in a two-pronged inquiry: "(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced . . . .?" Kjorsvik, 117 Wn.2d at 105-06; accord State v. Zillyette, 173 Wn.2d 784, 786, 270 P.3d 589 (2012) (more recent case applying standard) If the necessary elements are neither found nor fairly implied in the charging document, this Court presumes prejudice and reverses without further inquiry as to prejudice. McCarty, 140 Wn.2d at 425, 428 (in prosecution for conspiracy to deliver methamphetamine, charging document, "liberally construed and subject to the Kjorsvik two-prong test, fails on its face to set forth the essential common law element of involvement of a third person outside the agreement to deliver drugs.").

Jackman was charged with unlawful possession of a stolen motor vehicle under RCW 9A.56.068. That statute reads, "A person is guilty of possession of a stolen vehicle if he or she possess [possesses] a stolen motor vehicle." RCW 9A.56.068(1) (alteration in original).[15]

The charging document in this case alleged, as to counts 1 and 2, that "[o]n or about [December 2, 2015] the above-named Defendant did possess a stolen motor vehicle, to wit: [motor vehicle at issue], contrary to [RCW] 9A.56.068." CP 34.

In State v. Moavenzadeh, the Supreme Court reversed various convictions where an information charging three counts of first degree possession of stolen property contained no language that could fairly be read to allege that Moavenzadeh knew the property was stolen. 135 Wn.2d 359, 363, 956 P.2d 1097 (1998). Overruling prior cases, the Court held that the "knowledge" the property is stolen is an essential element of the crime. Id. at 363-64. The Court therefore reversed the convictions. Id. at 364.

Recently, in State v. Porter, 186 Wn.2d 85, 90, 375 P.3d 664 (2016), the Supreme Court overturned case law from this Court dealing

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[15] Before 2007, the crime was simply charged as possession of stolen property. RCW 9A.56.140(1); former RCW 9A.56.150(1) (1995); Laws of 2007 ch. 199, § 6; State v. Rhinehart, 92 Wn.2d 923, 925, 602 P.2d 1188 (1979).

with another asserted essential element of possession of a stolen motor vehicle.

In State v. Satterthwaite, 186 Wn. App. 359, 344 P.3d 738 (2015), this Court had determined that RCW 9A.56.140(1), which states that possession means to "'withhold or appropriate [stolen property] to the use of any person other than the true owner or person entitled thereto," provided an additional essential element of the crime of possession of a motor vehicle. Id. at 88.

Rejecting that statutory language as merely definitional, the Supreme Court overruled Satterthwaite, as well as this Court's decision in Porter, and reinstated Mr. Porter's conviction. Id. at 92, 94.

Nonetheless, the Supreme Court reaffirmed the continued viability of Moavenzadeh. The Court observed that the charging document in Porter's case complied with Moavenzadeh. Porter, 186 Wn.2d at 93.

In summary, the charging document failed to allege Jackman knew the vehicles were stolen. Thus, it was inadequate. Jackman's count 1 and 2 convictions must be reversed.[16]

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[16] If the conviction is reversed, the corresponding restitution order must also be reversed. CP 93-94, 144-45 (setting restitution related to count 1 only); see State v. Tobin, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007) (restitution is allowed only for losses causally connected to the crime the accused was actually convicted of committing); RCW 9.94A.753.

3. THIS COURT SHOULD NOT AWARD THE COSTS OF APPEAL.

As a final matter, if Jackman does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 of the Rules of Appellate Procedure. This Court has ample discretion to deny the State's request for costs. For example, RCW 10.73.160(1) states the "court of appeals . . . *may* require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000).

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn2d 827, 834, 344 P.3d (2015). Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id.

The existing record establishes that any award of appellate costs would be unwarranted in this case. Jackman has preexisting legal financial obligations of over $90,000. CP 117-20 (Motion and Declaration for Order Authorizing Defendant to Seek Review at Public Expense, declaring that Jackman has no assets). But he received a DOSA with the goal of treating his drug addiction. Upon release, he will be attempting to

turn his life around. RP 147-48, 150. Imposing additional debts will impose further barriers to Jackman's reentry into society.

Moreover, at sentencing, the court imposed only mandatory fines, waiving other costs. CP 110. The trial court then found Jackman to be indigent and found that should be allowed to appeal at public expense. CP 121-22 (Order of Indigency). Indigence is presumed to continue throughout the appeal. State v. Sinclair, 192 Wn. App. 380, 393, 367 P.3d 612 (citing RAP 15.2(f)), review denied, 85 Wn.2d 1034 (2016).

In summary, in the event that Jackman does not substantially prevail on appeal, this Court should not assess appellate costs against him. Provided that this Court believes there is insufficient information in the record to make such a determination, however, this Court should remand for the superior court, a fact-finding court, to consider the matter.

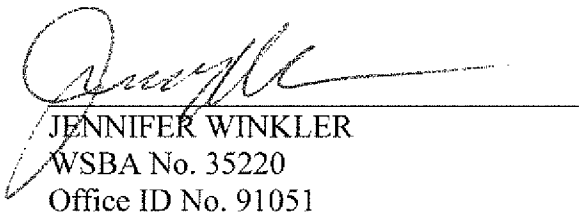
D. CONCLUSION

The court erred in denying Jackman's motion to suppress the evidence. Because the only evidence supporting the convictions should have been suppressed, each of Jackman's convictions should be reversed and the charges dismissed with prejudice. In any event, the charging document omits an essential element of counts 1 and 2, and those convictions must be reversed for that reason as well. Finally, in the event that Jackman does not substantially prevail on appeal, this Court should exercise its discretion and decline to order Jackman to pay the costs of the appeal.

DATED this 21ST day of October, 2016.

Respectfully submitted,

NIELSEN, BROMAN, & KOCH, PLLC



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APPENDIX

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JEFFERSON COUNTY
RUTH GORDON, CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR JEFFERSON COUNTY

STATE OF WASHINGTON, Plaintiff, vs. SHANE R. JACKMAN, Defendant.	**NO. 15-1-00190-1** **FINDINGS OF FACTS AND CONCLUSIONS OF LAW RELATING TO CrR 3.6 HEARING**

COMES NOW the Plaintiff, the State of Washington, by and through its attorney, James Kennedy, with the following findings of facts and conclusions of law regarding the respondent's motion to suppress pursuant to CrR 3.6, held on March 4, 2016.

FINDINGS OF FACTS

1. On December 2, 2015, SGT Pernsteiner met with Deputy Newman in Quilcene, WA to investigate a possible stolen phone and vehicle in Brinnon, WA at approximately 6pm.

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2. Both deputies were employed by the Jefferson County Sheriff's Office and were on duty at the time. Deputy Newman has approximately 10 years of law enforcement experience, and SGT Pernsteiner has approximately 18 years of law enforcement experience.

3. The stolen phone was an iPhone that had been in an Acura Integra that was reported stolen. The Acura Integra had after-market black-rimmed tires. The owner of the phone used a software application to locate his missing phone. The application indicated that the phone was located at 512 Seal Rock Road, in Brinnon, WA.

4. The two deputies travelled to 512 Seal Rock Road in Brinnon, WA and discovered a vacant vacation home. At the time the deputies arrived it was already after dark.

5. Across the street at 304694 US 101, the deputies observed a residence that had two separate buildings; a house and a separate garage / accessory dwelling unit (ADU). The ADU had a sliding glass door that faced the highway. From 512 Seal Rock Road, the deputies could see the ADU across the highway and that a light was on in the ADU. No lights appeared to be on in the main residence.

6. The deputies travelled across the street to 304694 US 101 and parked their patrol vehicles along the highway.

7. The residence at 304694 US 101 has a circular gravel driveway that forks shortly before connecting with US 101. As seen from US 101, the driveway continues up straight to the main residence. This part of the driveway is steep. The driveway also branches to the south (which is left as seen from the highway). The driveway travels in front of the garage/ADU before circling around behind the garage/ADU to connect with the part of the drive that heads straight to the house. The part of the

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driveway that heads south is less steep and branches again near a parking area in front of the garage to service another residence behind 304694 US 101.

8. Deputy Newman has been to this residence numerous times. Based on his prior observations, the typical traffic flow is for cars to pull into the driveway and then turn south so that the circular driveway is traversed in a clockwise fashion.
9. The deputies went to 304694 US 101 to inquire about the missing iPhone.
10. As the deputies approached the garage/ADU, they noticed one car parked along the portion of the driveway that heads south and two additional cars in a parking area in front of the garage door. One of the cars was an Acura Integra, similar to the car that was reported stolen. The other car was a green Honda Accord.
11. The garage door on the ADU faces south and the sliding glass door faces east toward US 101.
12. The garage door was closed.
13. The Acura Integra had a different color than that of the car reported stolen.
14. Next to the Acura Integra was a stack of tires with after-market black rims, similar to the ones that were reported to be on the stolen car that had the iPhone in it.
15. The Acura Integra had a license plate and registration.
16. The Honda Accord did not have a license plate. This raised the suspicion of the deputies who were following up on a report involving a stolen car.
17. The garage that the cars were parked in front of had a security light activated by motion sensor. Immediately beneath the light was a "No Trespassing" sign.
18. The deputies activated the security light as they approached the vehicles. Neither deputy observed a "No Trespassing" sign.

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19. The front of the Honda Accord was facing the garage.

20. SGT Pernsteiner walked from the shared driveway up the length of the Honda Accord until he could view the Vehicle Identification Number (VIN) through the windshield using the light provided by the security light.

21. SGT Pernsteiner wrote down the VIN and then reported it dispatch. Dispatch informed SGT Pernsteiner that the VIN belonged to a car that had been reported stolen.

22. SGT Pernsteiner turned around and walked back down the shared driveway to a small set of stairs that led to the sliding glass door on the ADU.

23. Deputy Newman continued to follow the driveway around the garage/ADU such that he was on the opposite side of the building that had the sliding glass door, where another door existed.

24. SGT Pernsteiner knocked on the sliding glass door. The person who answered the door was the Defendant, Shane Jackman. When Deputy Newman heard SGT Pernsteiner conversing with the Defendant, he walked toward SGT Pernsteiner and joined him at the sliding glass door.

25. The Defendant told SGT Pernsteiner that he knew why SGT Pernsteiner was there, that it was about "the phone." The Defendant then retrieved the phone and presented it to SGT Pernsteiner. SGT Pernsteiner confirmed it was the stolen phone by accessing the phone with a code given to him by the phone's owner.

26. The Defendant never informed the deputies that they were trespassing and needed to leave the property.

27. SGT Pernsteiner asked the Defendant if he would step outside so he could talk to

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him. The Defendant complied and spoke to SGT Pernsteiner about cars in the parking area in front of the garage door. The Defendant was cooperative, admitted that the car was stolen, and informed the deputies of some other stolen items that were on the premises. The Defendant was then placed under arrest.

28. The deputies indicated that they intended to go to the garage/ADU to inquire about the phone regardless of whether or not any vehicle had been present in the driveway.

CONCLUSIONS OF LAW

1. *State v. Seagull,* 95 Wn.2d 898 (1981)

   a. Holds that police on legitimate business may enter the curtilage of private property and access routes, which are impliedly open. While doing so, an officer is entitled to keep his eyes open.

   b. An officer's ability to intrude onto private property is the same as a reasonably respectful citizen.

   c. A substantial and unreasonable departure, or a particularly intrusive method of viewing, will exceed the scope of implied invitation and intrude upon the constitutional expectation of privacy.

   d. What is reasonable is determined by the facts and circumstances of each case.

   e. It is unreasonable to expect that in every case the police walk a tight rope while engaging in legitimate police activity.

2. *State v. Ague-Masters*, 138 Wn. App. 86 (2007)

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a. Police can enter an area of curtilage while on legitimate business, which is impliedly open to the public to include access routes. Police access must be consistent with the actions of a reasonably respectful citizen.

b. An officer viewing something in the open, using his senses while standing in a place where he is legally permitted to be does not constitute a search.

c. Whether the curtilage is impliedly open depends on the facts and circumstances of each case.

d. A "No Trespassing" sign does not necessarily create a legitimate expectation of privacy, especially without additional indicators such as fences, gates, cameras, or dogs.

e. Entering a property to talk with the inhabitants about a crime is legitimate police business.

3. *State v. Graffius*, 74 Wn. App. 23 (1994)

a. A police officer on legitimate police business may enter areas of the curtilage that are impliedly open, including access routes. While doing so officers are free to keep their eyes open.

b. A substantial unreasonable departure or particularly intrusive means of viewing will exceed the scope of implied invitation.

4. *State v. Meyers*, 117 Wn.2d 332 (1991)

a. Something detected by an officer's senses from a non-intrusive vantage point is an open view.

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b. In determining whether an officer exceeds open view, courts consider whether officers committed the following: spied on the house, acted secretly, approached in daylight, used normal and most direct access routes, attempted to talk to the residents, created an artificial vantage point, or made the discovery accidentally.

5. *State v. Daughtery*, 94 Wn.2d 263 (1980)

a. In that case, the respondent had parked cars in his driveway to obscure the contents of his garage. The defendant had a subjective expectation that a small squad of police officers would not go around the vehicles so they could view the contents of the garage to meet the defendant at his door.

b. Police officers in *Daughtery* went up both sides of the cars an in between them specifically so they could attempt to view the markings on a safe in the defendant's garage that was believed to be stolen. This was understood by the court to be pre-textual in an attempt to look for items related to a recent burglary.

CONCLUSION

The Deputies in the present case were headed to the residential or ADU portion of the garage since that was the only part of 304694 US 101 that appeared to be inhabited at the time. The deputies intended to speak with the defendant about the missing phone regardless of any vehicles that were parked nearby. At the time the deputies went to speak with the defendant, he was not suspected of being involved with the stolen car or phone.

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The security light activated as the deputies approached two vehicles that were parked outside of the defendant's garage. One of the vehicles was of the same make and model as the one reported stolen, though a different color. Next to it was stacked tires with aftermarket black rims, similar to those that were on the stolen car. The deputies were suspicious of this vehicle because of the tires and because it did not have a license plate.

The only intrusion, if it constituted an intrusion, was committed by the deputies when one of them walked to the front of the vehicle to view the VIN through the vehicle's windshield. This did not constitute a substantial and unreasonable departure from a non-intrusive area. The officer did not enter the vehicle, look for anything else or any contraband, nor did the officer engage in any questionable activity after having observed the VIN.

Dated this 19 day of May, 2016.

JUDGE

Presented by
James M. Kennedy WSBA No. 45329
Attorney for State

Approved as to Form
Richard Davies, WSBA No. 18502
Attorney for Defendant

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